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IN THE

Supreme Court of the United States

October Term, 1967
No. 739

METLOX MANUFACTURING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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NATIONAL LABOR RELATIONS BOARD,

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Metlox Manufacturing Company prays that a writ of certiorari issue to review the final judgment of the Court of Appeals for the Ninth Circuit refusing to set aside a decision and order of the National Labor Relations Board, on the grounds that the Ninth Circuit's decision is in conflict, on a federal question, with the applicable decision of the Supreme Court and also is in conflict with decisions of other Circuits. (Supreme Court Rule 19.)

Opinions Below.

The National Labor Relations Board's Decision and Order dated July 12, 1965 [R. 36-63] is reported in 153 N.L.R.B. No. 124, 59 L.R.R.M. 1657. A copy is printed as Appendix A hereto.

The first opinion of the Court of Appeals for the Ninth Circuit dated February 6, 1967 was withdrawn as a result of Petitioner's petition for rehearing. The Ninth Circuit's first opinion is unreported. A copy is printed as Appendix B hereto.

The revised opinion of the Court of Appeals for the Ninth Circuit dated May 5, 1967 [R. 78-83] is reported at 378 F. 2d 728. A copy is printed as Appendix C hereto.

Jurisdiction.

The decree of the court below was entered on July 21, 1967 [R. 84-88] and is printed as Appendix D hereto. The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254(1).

Questions Presented.

1. When an employer claims inability to pay a wage increase and is at all times ready and willing to substantiate that claim by letting an accountant chosen by the union have carte blanche access to the employer's books, can the Board and the Ninth Circuit find the employer guilty of a refusal to bargain merely because the employer places reasonable restrictions on the union's accountant's disclosure of the details of his audit to the union?

2. Particularly, can the Board and the Ninth Circuit find the employer guilty of such a refusal to bargain when both the Board and the Ninth Circuit expressly recognize an employer's right to restrict the disclosure, but both the Board and the Ninth Circuit expressly are unable to indicate the scope of that right?

3. Can the Board and the Ninth Circuit hold a strike to be an unfair labor practice strike when there is no proof that the strike was caused by unfair labor practices?

Statutes Involved.

1. Section 7 of the National Labor Relations Act, as amended, 29 U.S.C. §157:

> "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 158(a)(3)."

2. Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. §158(a)(1) and (5):

> "(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> (2) . . .
>
> (3) . . . .
>
> (4) . . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

3. That portion of Section 8(d) of the National Labor Relations Act, as amended, 29 U.S.C. §158(d), which provides:

> "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: . . ."

Statement of the Case.

1. The Proceedings.

This petition seeks a review of a decree of the Court of Appeals for the Ninth Circuit refusing to set aside, and enforcing, a decision and order of the National Labor Relations Board that Petitioner violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act and that such violations caused a strike by Petitioner's employees.

Following the Ninth Circuit's original opinion herein, Petitioner petitioned for a rehearing [R. 83A];[1] that petition was granted, the Ninth Circuit's original opinion was withdrawn, and a revised opinion is-

[1] "R" refers to Volume 1, Record on Appeal; "T" refers to Volume II, Record on Appeal (Reporter's Transcript); "GCX" refers to General Counsel's exhibits, "RX" to Petitioner's.

sued. [R. 78-80; 83B.] Judge Barnes, who had concurred in the original opinion (App. B), partially concurred with and partially dissented from the revised opinion. [R. 80-83.]

The decree below was approved by only two of the three judges who heard the matter; Judge Barnes did not join in such approval. [R. 84.]

2. The Facts.

The Union was the duly certified collective bargaining representative of an appropriate unit of Petitioner's employees. [R. 37:23-39.]

During the contract negotiations, the Union requested and Petitioner supplied information from Petitioner's records on seniority and earnings of employees, including piece work rates, Petitioner's group insurance plan, time studies done by Petitioner in setting existing wage rates, and a list of employees on layoff. [R. 38:36-41.]

The information requested by the Union and supplied by Petitioner included employees' minimum base rates; top base rates; Petitioner's review schedule for wage increases; existing fringe benefits (holidays, shift differentials, vacations, group insurance coverage); incentive rates for each product manufactured, by department; payroll review scales as a percent of production; group insurance premium report; group life insurance policy; the method by which the incentive standards were established; average hourly earnings of each employee; total earnings of each employee; hours worked by each employee; samples of the thousands of statistics in connection with incentive rates (Petitioner offered to supply others, if the Union wished); list of

layoffs, whether recalled and if not, why not; group health and accident experience; and standard data calculation sheets related to piece rates. [T. 197-202.]

Petitioner at all times was willing to, and did, provide this multitude of data to the Union, and there is no contention in this case that Petitioner bargained in other than complete good faith with respect to supplying the Union with this exhaustive and detailed information.

The Union proposed a 35 cent per hour wage increase and other cost items, which were rejected by Petitioner on the ground that it was not financially able to give an increase in any cost item. [R. 38:43-39:7.]

In support of its position, Petitioner presented to and discussed with the Union a financial analysis of the cost to Petitioner of the Union's proposals [R. 38:43-39:4] and also Petitioner's profit and loss statements for the past three years. [R. 39:15-65.]

Petitioner offered to give to the Union Petitioner's profit and loss statements for the past 10 years [GCX 2(c), 114:1-5; GCX 2(c), 117:20-118:4], but the Union only wanted the information for 1961, 1962 and 1963. [GCX 2(c), 118:5-119:5.]

The 1961 profit and loss statement showed a profit of $29,966; the 1962 statement, a profit of $5,272; and the 1963 statement (through November 30, 1963), a loss of $4,597. [R. 39:62.]

As shown by the profit and loss statements, Petitioner could not afford to pay the cost increases proposed by the Union; the annual cost of the Union's initial proposal was $218,188 [RX 1] and the Union never

reduced its proposal below an annual cost of $68,022 [RX 2].

The Union wanted to examine Petitioner's books to see if there was "poor management," or if there were any "deadheads" on the payroll, or if Petitioner's assets were being "bled." [R. 46:30-33.]

Petitioner offered to permit an examination of its books, subject only to the conditions that (1) the examination be in Petitioner's office (2) by a Certified Public Accountant chosen by the Union and approved by Petitioner (3) with the cost borne by the Union, and (4) with the details of Petitioner's financial records not to be disclosed to any third parties, including the Union, except to advise the Union as to "whether or not the Company's representations (already submitted to the Union) are true." [R. 40:30-41:23; GCX 3(d).]

Petitioner also offered to give the Union's accountant carte blanche to examine whichever of Petitioner's records the accountant deemed necessary in order for him to verify Petitioner's representation as to Petitioner's inability to pay. [GCX 3(f).]

The Union agreed to each of these conditions, except for the confidentiality of Petitioner's records. [R. 41:28-37; GCX 3(e).]

Thus, as found by the Trial Examiner and the Board (and affirmed by the Ninth Circuit), the "only significant difference between the Respondent [Petitioner herein] and the Union is the extent to which the information developed by the accountant in the course of his examination of company records can be disclosed to the Union." [R. 44:30-34.]

It was on the basis of this "only significant difference" that the Trial Examiner, the Board and the Ninth Circuit convicted Petitioner of a refusal to bargain; and yet neither the Trial Examiner, the Board nor the Ninth Circuit were able to say how much further, in their opinion, Petitioner should have permitted disclosure of the information developed by the Union's accountant. Indeed, both the Trial Examiner and the Board (with the express approval of the Ninth Circuit [R. 80]) expressly abdicated their ability to state the extent to which they believed Petitioner could have kept its books confidential, and expressly stated that they were unable to say to what extent Petitioner was entitled to protect its books from the eyes of others than the accountant without being held guilty of a refusal to bargain. [R. 47:40-43; R. 80.]

Nevertheless, and despite the Board's own express inability to spell out the extent to which the information developed by the Union's accountant could be kept confidential, and despite Petitioner's complete willingness at all times to permit substantiation of its inability to pay a wage increase or to give other requested cost items, the Board held that Petitioner failed to bargain in good faith. [R. 47:37-40; 48:29-32; R. 62-63.]

It is from the Ninth Circuit's decree enforcing the Board's order that Petitioner seeks relief.

3. Why Certiorari Should Be Granted.

The Ninth Circuit's decision in this case:

a. is in conflict, on a federal question, with the applicable decision of the Supreme Court; and

b. is in conflict with decisions of other Circuits.

These conflicts present important questions as to the administration of the National Labor Relations Act, as amended, and certiorari should be granted to resolve these conflicts.

The importance of this case to the administration of the National Labor Relations Act is underscored by the conflict between the Ninth Circuit's decision and a decision on the same point by the District of Columbia Circuit, by the conflict between the Ninth Circuit's decision and a decision of this Court, by the Board's and the Ninth Circuit's own acknowledged inability to resolve the questions presented by this case, and by the fact that even the Ninth Circuit was split two-to-one.[2]

And, of course, it is of paramount importance to Petitioner that Petitioner has been held guilty of a refusal to bargain when not even the combined talents of Trial Examiner, Board and Ninth Circuit are able to say what Petitioner should have done differently in order to, in the opinion of these lower tribunals, have bargained in good faith. It is basically unfair to hold Petitioner guilty of a refusal to bargain, when, as Judge Barnes points out, Petitioner "has at all times been willing to substantiate its claim of inability to pay the requested wage increases" [R. 82], and when neither Trial Examiner, Board nor Ninth Circuit is capable of indicating how much additional disclosure is required in order, in their opinion, for Petitioner to be said to be bargaining in good faith.

---

[2]The uncertainty and confusion which should be resolved by granting certiorari herein are highlighted by the unusual fact that both the Ninth Circuit decision and the conflicting District of Columbia Circuit decision were written by the same Judge, Judge Washington. Petitioner expressly relied below on Judge Washington's District of Columbia decision, but Judge Washington does not even refer to it in his conflicting Ninth Circuit decision in this case.

ARGUMENT.

1. The Ninth Circuit's Decision in This Case Is in Conflict With N.L.R.B. v. Truitt Manufacturing Co., 351 U.S. 149 (1956).

In *Truitt,* this Court has laid down the guide-line that Section 8(a)(5) of the Act requires that an employer asserting inability to pay a wage increase must provide "some sort of proof" of the accuracy of the assertion, but it does not automatically follow that in every case in which economic inability is raised as an argument, the employees are entitled to substantiating data. (351 U.S. at 153-154.)

The test of good faith bargaining is met if the employer *attempts* to substantiate the claim of inability to pay. (351 U.S. at 153.)

Here, Petitioner not only provided the Union with profit and loss statements, but offered to let a certified public accountant, chosen by the Union, conduct a carte blanche audit of Petitioner's books to verify Petitioner's representations as to inability to pay. [R. 41:4-15; GCX 3(f).]

Since Petitioner has met the requirements of *Truitt,* the Ninth Circuit's decision that Petitioner did not bargain in good faith is in conflict with *Truitt* and certiorari should be granted.

2. The Ninth Circuit's Decision in This Case Is in Conflict With Fruit & Vegetable Packers v. N.L.R.B., 316 F. 2d 389 (D.C. Cir. 1963).

In *Fruit & Vegetable Packers,* the District of Columbia Circuit held that an employer may circumscribe the manner in which he makes his records available for inspection. (316 F.2d at 391.)

Ironically, the decision in *Fruit & Vegetable Packers* was written by Judge Washington, who, sitting by designation, also wrote the Ninth Circuit's decision in the present case. Although Petitioner repeatedly cited and relied upon *Fruit & Vegetable Packers* in its briefs below, [see, e.g., Petitioner's Petition for Rehearing, R. 83A] the decision in the present case does not even refer to *Fruit & Vegetable Packers,* not even to attempt to distinguish it.

Since the Ninth Circuit's decision in the present case is in conflict with *Fruit & Vegetable Packers,* certiorari should be granted.

3. Certiorari Should Be Granted so That This Court May Resolve the Obvious Confusions and Uncertainties Which Have Been Created by Board and Circuit Decisions With Respect to the Extent to Which Section 8(a)(5) Requires an Employer to Open His Books.

As this Court noted in *Truitt,* in the Board's decision in that case, the Board held that substantiation of the employer's inability-to-pay position requires no more than "reasonable proof." (351 U.S. at 151-152.)

In *Albany Garage, Inc.,* 126 N.L.R.B. No. 52, 45 L.R.R.M. 1329 (1960), the Board itself held that merely furnishing profit and loss statements (which is less than Petitioner offered in the present case) is sufficient to meet the requirements of good faith bargaining. See also *Tennessee Chair Co.,* 126 N.L.R.B. No. 160, 45 L.R.R.M. 1472 (1960).

In the present case, although the Board acknowledges that an employer is not required to permit an unlimited audit [R. 46:44-47:1], the Board expressly is

unable to state the scope of the audit which it believes should be permitted. [R. 47:40-43.]

In *White Furniture Co.*, 161 N.L.R.B. No. 23, 63 L.R.R.M. 1277 (1966), the Board asserts that, in the present case, the Board "declined to require an employer [Petitioner Metlox herein] to give a union such sensitive information as executive salaries and detailed breakdowns of operating expenses." (63 L.R.R.M. at 1278.) However, this purported limitation is not in fact found in the decision in the present case; instead, as noted, the Board actually stated that it was unable to say what information must or must not be given. [R. 47:40-43.]

The history of the present case illustrates the uncertainty and confusion which exists.

In the initial decision of the Ninth Circuit in this case, Judge Barnes, although concurring, stated that "I believe that if the Board's order is enforced as it stands, this case will make law beyond the implications of the facts of this case." (App. B.)

Thereafter, rehearing was granted, and this time Judge Barnes dissented from the enforcement of the Board's order as it stands [R. 80; App. C.], pointing out that "Metlox has at all times been willing to substantiate its claim of inability to pay the requested wage increases." [R. 82; App. C.]

Also, as Judge Barnes points out, neither the Board's order nor the Ninth Circuit's decision give any indication of what Petitioner, on pain of contempt, must do to comply with the law. [R. 82; App. C.]

Also, the Trial Examiner, the Board and the Ninth Circuit have, contrary to the evidence, said that Pe-

titioner's offer limited the Union's accountant to a naked "yes or no" answer as to whether the profit and loss statements were "true." [R. 47:37-40; 48:29-32; R. 80.] However, Petitioner's offer was by no means so limited; Petitioner offered to let the Union's accountant examine whatever records he deemed necessary to establish proof of Petitioner's representations of *financial position* [GCX 3(d); GCX 3(f)] which, of course, would include proof of Petitioner's inability to pay a wage increase or to give other cost items.

In view of the Board's and the Ninth Circuit's departure in the present case from the standard that the Board itself urged upon this Court in the *Truitt* case (*i.e.*, that all that is required is "reasonable proof"); in view of the Board's and the Ninth Circuit's own express inability in the present case to resolve the question of how far the books must be bared; in view of the Board's and the Ninth Circuit's saying, contrary to the evidence, that Petitioner was limiting the accountant to a naked "yes or no" answer as to whether the profit and loss statements were "true"; and in view of the two-to-one split in the Ninth Circuit, certiorari should be granted so that these confusions and uncertainties created by the Board and the Ninth Circuit may be set at rest by this Court.

4. The Ninth Circuit's Decision That the Strike Was an Unfair Labor Practice Strike Is in Conflict With Other Decisions of the Circuits.

If a strike would have taken place *even if* a company had not engaged in an unfair labor practice, then the strike is not an unfair labor practice strike. (*N.L.R.B. v. Remington Rand, Inc.*, 94 F. 2d 862, 872 (2 Cir. 1938), cert. den. 304 U.S. 576 (1938).)

The only witness called by the General Counsel with respect to the reasons for the strike was Mrs. Riley, the Union's Financial Secretary. On direct examination by the General Counsel, Mrs. Riley testified that *after* (not before) the strike had occurred, the Union representatives explained ex post facto to the employees ("so they would know about it") why they had struck, and listed the reasons as stalling tactics, refusal to bargain, unfair labor practices and Mr. Shaw's complete ignoring of the Union. [T. 167.]

As to the situation *before* the strike, Mrs. Riley testified on cross-examination by Petitioner that the strike was an economic, not an unfair labor practice, strike ("money . . . probably was the basic concern with the people" [T. 172]) and that [T. 175]:

> "A: . . . at practically every meeting, Mr. Rail [the Union agent] assured us that more than likely we could settle this without a strike. He didn't feel that it would come down to the point of having a strike.
>
> Q: Did he say—settle what, did he say? A. Basically, a good working contract for the people."

Mrs. Riley also testified on cross that "at all the subsequent meetings," Mr. Rail said that the matter could be settled "very easily without a strike" if such requests as wages, vacation pay, holidays, seniority, job security and insurance were met. [T. 180.]

Here the only evidence that the strike was an unfair labor practice strike (rather than an economic strike) was Mrs. Riley's testimony that *after* the strike the Union representatives told the employees that they had struck in protest of unfair labor practices; but a

mere assertion by a union that it is striking to protest an unfair labor practice does not make the strike an unfair labor practice strike, particularly where (as here) such a finding is based upon the single statement of a highly partisan witness long after the event. (*N.L.R.B. v. Scott & Scott*, 245 F. 2d 926, 929-930 (9 Cir. 1957).) Under such circumstances, a conclusion (as here) that a strike is an unfair labor practice strike is "inconclusive, argumentative and inconsequential." (245 F. 2d at 929-930.) There must be proof of causal connection between an unfair labor practice and a strike to justify a finding that it is an unfair labor practice strike. (*Winter Garden Citrus Food Co-op. v. N.L.R.B.*, 238 F. 2d 128, 129 (5 Cir. 1956).)

Because there is no substantial evidence in the present case of causal connection between any unfair labor practice by Petitioner and the strike, the Ninth Circuit's decision affirming such a finding by the Board is in conflict with the other above-cited decisions. For this reason, certiorari should be granted.

Conclusion.

The Ninth Circuit's decision in this case is in conflict with the applicable decision of this Court and with decisions of other Circuits. The decision (and the two-to-one split thereon by the Ninth Circuit) emphasizes the uncertainty and confusion surrounding the entire question of how far an employer is entitled to protect his books or must bare them when he is unable to pay increased wages or other cost items. The fact that neither the Trial Examiner, the Board nor the Ninth Circuit is able to resolve the question illustrates the importance of this Court's granting certiorari.

Here, Petitioner not only supplied a great multitude of pertinent data to the Union on a wide variety of subjects, but also agreed to a carte blanche audit by the Union's accountant with respect to Petitioner's inability-to-pay; accordingly, under all the circumstances, Petitioner should not be held guilty of a refusal to bargain solely because reasonable restrictions were placed upon the accountant's disclosure of the details of his audit to the Union.

Respectfully submitted,

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